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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/780,273	02/09/2001	Barrie R. Froseth	869.018US1	8033
21186	7590	08/15/2006		
SCHWEGMAN, LUNDBERG, WOESSNER & KLUTH, P.A. P.O. BOX 2938 MINNEAPOLIS, MN 55402				
			EXAMINER	
			THAKUR, VIREN A	
			ART UNIT	PAPER NUMBER

1761

DATE MAILED: 08/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/780,273

Applicant(s)

FROSETH ET AL.

Examiner

Viren Thakur

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 January 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 128-146 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 128-146 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>11/20/2001</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.
2. Claim 128 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claim recites the limitation **customized**, in the first line of the claim. It is unclear as to what the Applicant regards as a customized food product.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent,

except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

4. Claims 128-130 and 144 are rejected under 35 U.S.C. 102(b) as being anticipated by Ezzat (GB 2,250,266). Ezzat discloses preparing popcorn in a microwave oven by placing butter, salt, sugar (a sweetener) and unpopped kernels in a microwave package (Page 2, Line 7; Page 3, Lines 1-23), which would involve opening the package after popping. It is thus known that upon popping the unpopped kernels the consumer has further finished the product by popping in a microwave that, therefore, cooks the food product. Ezzat's invention is considered customized: during the process food packages containing butter, sugar, salt or a combination thereof have been dispensed into the container with unpopped kernels. The consumer then *selects* a product upon purchase that suits the consumer's needs and preferences.
5. Claims 128 is rejected under 35 U.S.C. 102(b) as being anticipated by Callahan et al (US 2,802,599). Callahan discloses a food customized food product (Column 1, Lines 56-58) that incorporates customer selected additives (Column 4, Lines 36-45) and is then packaged in a container (Column 3, Lines 15-17).

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6. Claims 128 is rejected under 35 U.S.C. 102(e) as being anticipated by Olander, Jr. et al (US 5,997,924). Olander discloses a customized food product where the food ingredient is selected by the consumer (Column 2, Lines 8-10), additives can be incorporated onto the uncooked food ingredient (Column 2, Lines 22-24), and dispensed into a package that is appropriate for the handling of the chosen food product (Column 2, Lines 26-29). The examiner understands that additives are additions that are incorporated into or onto the food product. Olander discloses that the food product can then be dispensed or packaged by several means.

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.
8. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:
 1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.

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3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
9. Claims 131-143, 145 and 146 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat in view of Mohlenkamp Jr. et al (US 5,120,563) and Google Groups. Ezzat discloses as discussed above. Ezzat does not disclose the sweetener to be sucralose or acesulfame K. Mohlenkamp discloses the use of alternatives to table sugar (sucrose) such as acesulfame K for use in food products (Column 16, Lines 51-66; Column 17, Lines 1-10) for reduced calorie diets (Column 17, Line 66). Google Groups discloses how to make a low carbohydrate sweet and salty popcorn by combining commercially available microwave popcorn with sucralose, as opposed to another sugar alternative, SugarTwin®.

With regard to Claims 131-133, 135, 136, 138, 140-143, 145 and 146, it would have been obvious to a person having ordinary skill in the art at the time of the invention to modify Ezzat as taught by Google Groups in order to provide another substitute sweetener to be incorporated into a food product, such as popcorn, for a low carbohydrate low calorie diet. It is further known that sweeteners exist as a substitute to sugar for diet conscious consumers. Sucralose provides an alternative option to known sweeteners such as aspartame, saccharin, acesulfame, which have been studies to cause health side effects. Thus it would have been obvious to incorporate this sweetener as well into a packaged food product. Furthermore, with regards to Claims 138-143, it

would have been obvious that in order to provide the food product as disclosed by Ezzat and taught by Google Groups and Mohlenkamp, a process would be required to provide such a food product for a consumer.

With regard to Claims 134, 137 and 139 it would have been obvious to a person having ordinary skill in the art at the time of the invention to modify Ezzat as taught by Mohlenkamp in order to provide a substitute to the sugar that is added to the food package. It is obvious that there are several reasons for which substitutes to table sugars have been developed; one of those reasons being to provide a reduced calorie sweetener for products. Since sweeteners such as acesulfame K provide the same function as sugar with a lower caloric intake, it would have been obvious to incorporate sugar substitutes as well into the process of providing a food package that contains additives such as sweeteners.

10. Claims 138-143 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat/Google Groups/Mohlenkamp Jr. in further view of Callahan. Ezzat/Google Groups/Mohlenkamp disclose as discussed above. Callahan discloses as discussed above in paragraph 5. Therefore, it would have been obvious to a person having ordinary skill in the art at the time of the invention to further modify Ezzat/Google Groups/Mohlenkamp as taught by Callahan in order to provide a self-service system for obtaining a customizable product.

Response to Arguments

11. Applicant's arguments filed on January 9, 2006 have been fully considered but they are not persuasive.
12. Applicant's arguments with respect to claim 128-146 have been considered but are moot in view of the new ground(s) of rejection. The previous claims have been cancelled and therefore any argument provided that pertains to the new claims has been considered and addressed below.
13. In response to applicant's argument that the applied references do not have anything to do with customizing food products, the examiner refers the applicant to the new grounds for rejection.
14. Regarding the validity of the Google Groups reference which indicates that sucralose was available in 1999, the Applicant asserts that the United States Food & Drug Administration (FDA) did not approve consumer sale of Splenda until October 2000. Sucralose has been available to markets outside the United States since at least 1990 and therefore it should be considered that sucralose was available to consumers outside of the United States prior to FDA approval. Nevertheless, the Examiner is also providing reference from the Splenda® web-

site indicating that since April 1999 sucralose received FDA approval for consumer sale on a limited basis, via the Internet.

15. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Google Groups teaches that sucralose was available to consumers in April 1999. Additionally, it is well known in the art that sucralose has been used as a sugar substitute for low calorie/ low carbohydrate diets as well as for diabetics: since conception sucralose has been known to have no effect on insulin secretion. Therefore, there would have been appropriate motivation to modify Ezzat as taught by Google Groups in order to incorporate another sugar alternative into the process of adding a sweetener as an additive to food products such as unpopped kernels of popcorn.

Conclusion

16. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. US 5,997,916 discloses a process of making microwave popcorn bags with uncooked kernels that incorporates the addition of nutritional supplements. US 5,848,399 discloses a system for selecting prepackaged products using a computer system.
17. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is (571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571)272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Viren Thakur
7/6/2006



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SUPERVISORY PATENT EXAMINER